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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 413

CITY OF DETROIT,
a Michigan Municipal Corporation, and
COUNTY OF WAYNE,
a Michigan Constitutional Body Corporate,
Petitioners and Defendants,
vs.
THE MURRAY CORPORATION OF AMERICA,
a Delaware Corporation,
Respondent and Plaintiff
and
THE UNITED STATES OF AMERICA, Intervenor

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT and APPENDIX

CITY OF DETROIT, a Michigan
Municipal Corporation,
By PAUL T. DWYER,
Its Corporation Counsel, and
JAMES H. LEE,
Assistant Corporation Counsel,
and
COUNTY OF WAYNE, a Michigan
Constitutional Body Corporate,
By GERALD K. O'BRIEN,
Prosecuting Attorney, and
ALBERT E. CHAMPNEY,
Of Counsel,
Petitioners and Defendants.

Interstate Brief & Record Co., 442 Beaubien St., Detroit 26, Michigan

SUBJECT INDEX

	Page
Opinion of Court Below	20a
Jurisdiction	2-4
Questions Presented	4-6, 11-12
Statutes, Federal Regulations, etc.	7 (1a-19a)
Statement of Facts	7-11
Reasons for Allowance of Writ	12-14
Summary	14
Conclusion	16

CITATIONS OF AUTHORITIES

Carter v. Carter Coal Co., 298 U. S. 238	14
Ex parte Quirin, 317 U. S. 1	14
Railroad Retirement Board v. Alton R. Co., 295 U. S. 330	14
Rickert Rice Mills v. Fontenot, 297 U. S. 110	14
United States v. Bankers Trust Co., 294 U. S. 240	14
United States v. United Mine Workers, 330 U. S. 258	14
Youngstown Co. v. Sawyer, 343 U. S. 579	14

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To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Come now the City of Detroit, a Michigan municipal corporation, and County of Wayne, a Michigan Constitutional Body Corporate, petitioners and defendants in the above entitled consolidated action and hereby move the Court to grant its writ of certiorari based on the following:

A.

This application for writ of certiorari is filed to obtain relief at the hands of the Supreme Court from determination of Hon. Thomas P. Thornton, District Judge, for the Eastern District of Michigan, in the above entitled consolidated action, wherein the United States is an intervening party, a copy of the opinion being hereto appended (20a), which is not yet reported in the Federal Reports.*

B.

GROUNDS ON WHICH JURISDICTION IS INVOKED

(i) On June 29, 1955, pursuant to said opinion, an Order granting motion of the plaintiff for summary judgment was signed and entered. On the same date also signed and entered were:

(a) A judgment for plaintiff against defendant, City of Detroit, in the first half of 1952 tax case for $33,857.48, plus the sum of $4,876.49, as interest, with interest thereon at the rate of five percent per annum from date of entry thereof.

(b) A judgment for plaintiff against defendant, City of Detroit, in the second half case for $33,857.48, plus the sum of $4,157.02, as interest, with interest theeron at the rate of five percent per annum from date of entry thereof.

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*For compliance with Rule 21 (1), the original files containing all proceedings, depositions and exhibits in these cases have been transmitted to the Clerk of this Court in lieu of a transcript of record, pursuant to an order to that effect entered Sept. 14, 1955 by Hon. Chase C. Simons, Chief United States Circuit Judge, Sixth Circuit.

(c) A judgment for plaintiff against defendant, County of Wayne, for $12,572.66, plus the sum of $1,543.64, as interest, with interest thereon at the rate of five percent per annum from date of entry thereof.

(ii) That within the time provided by Court Rule, Notices of Appeal were filed by the respective defendants and entered on July 27, 1955, in each of said cases, to the Court of Appeals for the Sixth Circuit. That upon the filing of Supersedeas Bond in each of said cases as required by Court Rule, Orders Staying Proceedings were duly signed and entered by Hon. Arthur A. Koscinski, District Judge, for and in the absence of Hon. Thomas P. Thornton.

Thereupon by stipulation of the respective parties, Orders for Consolidation of the several actions for presentation and hearing of appeals taken by said defendants were signed and entered on July 29, 1955. On the same day, also on stipulation, an Order for extending the time for filing record on appeal and docketing appeal to and including Sept. 30, 1955 was signed and entered.

On Sept. 8, 1955, steps to file the record on appeal and docket the Appeal in the United States Court of Appeals for the Sixth Circuit were jointly taken by the respective defendants and the required fee paid.

(iii) Sec. 1254 of the 1948 Revised Judicial Code (Title 28 U. S. C. A. §1254) confers on the Supreme Court jurisdiction to review the judgments in question in this consolidated appeal by writ of certiorari:

> "(1254) Cases in the Courts of appeal may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;"

Sec. 2101 of said Code as amended May 24, 1949 c 139 §106, 63 Stat. 104 (Title 82 U. S. C. A. §2101) provides:

"(c) Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days."

"(e) An application to the Supreme Court for a writ of certiorari to review a case before judgment has been rendered in the court of appeals may be made at any time before judgment."

C.

QUESTIONS PRESENTED FOR REVIEW

The plaintiff in this action is a Delaware corporation with its principal office in the City of Detroit, Wayne County, Michigan. On Court Order, leave was given to the United States to intervene in the case on Feb. 4, 1954. However, no relief was awarded it by the District Court's judgments.

The defendants are City of Detroit, a municipal corporation, and County of Wayne, a Michigan constitutional body corporate, from whom plaintiff corporation seeks refund of 1952 city and county personal property taxes levied under State law and paid by it under protest on these alleged grounds:

(i) That the Detroit Board of Assessors included property of the United States Government in its assessment of personal property of plaintiff corporation in the City of Detroit for 1952;

(ii) That said property claimed to be improperly assessed was exempt from taxation by the City of Detroit by virtue of the Constitution and laws of the United States and by virtue of the Constitution and laws of the State of Michigan.

(iii) That the entire tax levied thereon by the City of Detroit for the year 1952 was illegal and void because of such error in assesment of the personal property of plaintiff corporation.

These contentions stem from the imposition of an assessment for the purpose of collecting a non-discriminatory *ad valorem* tax on personal property acquired and being processed by an independent contractor (plaintiff corporation) in the City of Detroit under a sub-contract for eventual delivery to prime contractors and by the latter to the United States Air Force under separate prime contracts.

The broad question raised by plaintiff corporation and the Government is whether the taxes in question were based on assessment of property owned by the United States Government on Jan. 1, 1952, being the assessment date prescribed by Michigan law.

More specifically defendants submit the following as questions presented for review:

(i) Whether inclusion of partial payment and transfer of title clauses used in such contracts were in conformance with or in violation of federal statutes.

(ii) Whether inclusion of partial payment and transfer of title clauses would operate to defeat an *ad valorem* tax on personal property in the hands of an independent sub-contractor.

(iii) Whether the partial payment and passage of title clauses were included in the subcontract for any other reason than financial security for partial payments?

(iv) Whether statutory authority existed for the Government contracting officers themselves or by delegation for the prime contractor to include in the subcontracts the provisions for partial payments and for passage of title from the sub-contractor to the Government.

(v) Whether plaintiff corporation is the real party in interest as required by Rule 17(a) of the Federal Rules of Civil Procedure.

(vi) Whether the District Court Judge failed to take into account and give due weight to all the stipulated and undisputed facts (which show a course of conduct and dealing with the property in question inconsistent with the claim of absolute title in the Government).

(vii) Whether the District Court Judge gave to defendants all the favorable inferences to which they were entitled from the undisputed facts submitted on plaintiff's motion for summary judgment.

(viii) Whether the subject assessed property is entitled to exemption from a non-discriminatory *ad valorem* local property tax even if title is held to have passed to the Government by virtue of the questioned contract provisions?

D.

STATUTORY PROVISIONS INVOLVED

Statutory provisions connected with the issues are referred to below. Being too lengthy to set forth here in full, the pertinent text appears in the appendix attached hereto beginning at p. 7a.

Armed Procurement Act of 1947, Public Law of 80th Congress, 41 U. S. C. A. Sec. 151 *et seq.*

R. S. 3648, 31 U. S. C. A. 529

34 U. S. C. A. Sec. 582
41 U. S. C. A. Sec. 255
50 U. S. C. Sec. 611 App.

Sec. 211.1 C. L. Mich. 1948
Sec. 440.26 C. L. Mich. 1948
Sec. 566.137 C. L. Mich. 1948

E.

STATEMENT OF FACTS IN THE CASE

The matter here presented involves an appeal from a consolidated action* by plaintiff to recover personal property *ad valorem* taxes levied by defendants based on a common assessment as of Jan. 1, 1952 upon personal property in plaintiff's possession in its plant at Detroit, Michigan, procured and being processed for parts and components of aircraft and aircraft engines to be delivered to Kaiser Manufacturing Company and to Curtiss-Wright Corporation respectively. The latter were prime contractors with the

*Action No. 12108 was filed Sept. 9, 1952 to recover the first half of the City of Detroit 1952 taxes; Action No. 12482 was filed Feb. 11, 1953 to recover the second half of the City of Detroit 1952 taxes; Action No. 12483 was filed Feb. 1, 1953 to recover the 1952 County of Wayne taxes.

United States Air Force and were engaged in the manufacture of airplanes for the United States Air Force.*

Subsequent to the execution of the respective letter subcontracts, the prime letter contracts were amended to provide for inclusion and made applicable to such sub-contracts the language providing for partial payments prior to delivery on work in progress substantially as found in APR 5-407.2 (1) which is too lengthy to cite here and may be found in the appendix attached hereto (p. 1a).

Requests were made by plaintiff to the respective prime contractors and payments were thereafter received from Kaiser in the aggregate amount of $163,949.20 on Oct. 12, 1951, seven months following execution of its letter subcontract and from Wright in the amount of $510,827.67 on Dec. 31, 1951 eight months following execution of its letter subcontract. These payments were subsequently used by prime contractors as a basis for their own respective requests for partial payments from the Government.

---

*Plaintiff's sub-contract with Kaiser consisted of a letter of intent executed March 23, 1951 for the manufacture of certain parts and subassemblies therein specified, amended Aug. 15, 1951 and again on Oct. 4, 1951, under Kaiser's letter Prime Contract No. AF 33(038)-18481 with the United States Government entered into Dec. 20, 1950 and subsequently amended.

Plaintiff's other sub-contract with Wright was likewise a letter of intent executed April 19, 1951 for the manufacture of certain parts and subassemblies therein specified, amended on May 24, 1951, under Wright's Prime Contract No. AF 33(038)-18132 with the United States Government entered into Dec. 12, 1950 and subsequently amended.

The letter prime contract between Wright and the latter referred to a so-called Basic Agreement No. 1 and made it a part of the contract between them. Superseding definitive sub-contracts and prime contracts were not agreed upon nor made effective until after the assessment date here in question.

The Government inspection of goods and checking of plaintiff's procedures was carried on to effect a clearance for the prime contractor under its prime contract. Otherwise the Air Force had no direct supervision over plaintiff sub-contractor with respect to its costs.

According to the letter contracts involved here, the only reimbursement to plaintiff during the period to Jan. 1, 1952 was for its costs to the extent set forth. No profit was provided for until prices would be agreed upon in a definitive contract, the first prices being retroactive to the beginning of performance under the letter sub-contract.

Plaintiff included the amount of the 1952 taxes, here sought to be recovered, as an element of burden in computing costs submitted for forward price redetermination and retrospectively as to goods completed and delivered prior to the date of the first price redetermination. In the same way the prime contractors included the redetermined prices (which involved negotiating on all cost items of which taxes was but one of many) to the extent paid as part of their costs submitted to the United States Air Force (Stipulation II (5)). (See also Deposition Record pp. 101-117).

In this connection we quote from p. 108 of said deposition of Mark I. Sammon, Assistant Treasurer of plaintiff:

> "We have collected—I can't say we have collected all of it (1952 taxes) and I can't say we haven't. As it would enter the inventory if the inventory were completely liquidated, yes. If the inventory as it is were not completely liquidated, I don't know what portion would be left."

No supplies or subassemblies (end products made by plaintiff) had been completed, inspected or delivered to either of the prime contractors by plaintiff under said letter subcontracts prior to Jan. 1, 1952 and all materials, supplies and such uncompleted items as were on hand on assessment day were subjected to the assessment being challenged.

Such assessed property was identifiable prior to Jan. 1, 1952 by tagging, labeling or by segregation, all according to such letter sub-contract by number and description. Also it was segregated from other personal property owned and used by plaintiff in connection with its automotive and other operations.

Plaintiff's aircraft operations were separated from its automotive and other operations and under the supervision of a separate division manager and supervisory staff.

The agreed upon dollar valuation of personal property so assessed on Jan. 1, 1952 is $2,043,670.00. The claim of plaintiff against defendant City is in the sum of $67,-714.96 and against defendant County in the sum of $12,-572.66, exclusive of interest from the date same was paid under protest prior to commencement of the several actions herein.

On March 11, 1954, the consolidated action was heard and submitted before Hon. Thomas P. Thornton, District Judge, on plaintiff's motion for summary judgment filed Jan. 6, 1954.

Between these two dates depositions were taken at defendants' request, records of plaintiff Murray were examined and stipulations were prepared, executed and filed to the end that the matter could be submitted to the Court upon undisputed facts for his determination as a matter of law based upon the pleadings, stipulations, depositions and exhibits.

Defendants' Exhibit 3 consisted of a portion of the defendant City's personal property assessment roll, the line applicable to the subject property containing the notation "subject to prior rights of Federal Government."

WHAT THIS CASE DOES NOT INVOLVE

1. Tools already owned and furnished by the United States Government to plaintiff under a separate facility contract were not assessed and therefore are not involved.

2. Tools completed by plaintiff under the sub-contracts prior to Jan. 1, 1952 were not assessed and are not a subject of this suit.

3. The tax involved here is not a privilege or specific tax but an *ad valorem* non-discriminatory property tax.

4. The tax does not include any assessment against real estate.

5. No claim is made that the tax imposed a lien on the subject property in conflict with any prior rights of the Government.

F.

The matter does not involve the judgment of a State Court.

G.

BASIS FOR ORIGINAL FEDERAL JURISDICTION

Jurisdiction in the District Court is invoked by plaintiff on 28 United States Code, Sections 1331 and 1332 respectively.

(a) The controversy arises under the Constitution and laws of the United States and the amount involved

exceeds the sum of $3,000.00, exclusive of interest and costs.

(b) The controversy is between citizens of different States and the amount involved exceeds the statutory minimum.

ARGUMENT

Reasons for Allowance of Writ

1. As already indicated, the action was determined in the District Court on plaintiff's motion for summary judgment. All parties cooperated in an attempt to present the case on undisputed facts in the form of depositions, stipulations and exhibits which together with the pleadings would permit a determination as a matter of law. There are therefore no questions of fact for this Court to consider.

All that was reserved by the respective parties in connection with the stipulations was the right to argue the weight or materiality or interpretation of the agreed facts.

2. While this consolidated action involves only $67,714.96 claimed of defendant City and $12,572.66 claimed of defendant County, for the year 1952, plaintiff has similar actions pending for 1953 and 1954 in the District Court.

Likewise three other local taxpayers represented by counsel for plaintiff herein have a total of 15 cases pending in said Court, and 7 other local taxpayers have a total of 19 cases involving the same or similar issues now pending in the Wayne County Circuit Court awaiting trial.

3. It is respectfully submitted that the District Court erred in dealing with the issues presented by this action

and the fundamental constitutional questions involved, with the result that the Court's construction of the Armed Services Procurement Act of 1947 conflicts with operation of state tax laws upon which defendants rely for their principal revenue. These issues are of vital importance to the Government and to the defendants here, as it is also to a number of other State, county and local taxing units from coast to coast in which similar government contracts have been placed. Public interest, national and local, requires that this Court take jurisdiction and authoritatively resolve them by reversing the judgments of the District Court.

4. The present situation is seriously confused both as to authority for contracting policies of the Defense Department of the Nation on the one hand and the taxing procedures and fiscal policies of defendants locally on the other. Contracts continue to be let with the controversial provisions here in issue and assessments have been and are currently being made by defendant City's Assessors to meet the cost of providing necessary local services, followed by protests from the taxpayers affected by such assessments. It is for the additional reason that these questions are likely to recur that petitioners seek review by this Court of the judgments rendered against them before hearing and determination by the Court of Appeals.

5. The predicament of plaintiff and other taxpayers in a like situation is not to be overlooked. Uncertain of its rights under its sub-contracts entered into for production of subassemblies for a prime contractor and its obligations to pay local *ad valorem* taxes on personal property acquired and being processed, plaintiff has no choice other than to pay the taxes under protest and commence separate suits for their refund in each of the years such taxes are levied during the life of the sub-contract.

6. It is inescapable that the large number of cases pending on the docket of the District Court as well as several brought by other local taxpayers awaiting trial in the Wayne County Circuit Court would be expedited by prompt settlement by this Court of the important constitutional questions involved in this case.

SUMMARY

This matter manifests characteristics of others* in which this Court has seen fit to exercise its discretionary authority to issue a writ of certiorari prior to hearing and decision by the Court of Appeals. The circumstances recited above demonstrate the following compelling reasons to grant certiorari and permit briefs on the merits and oral argument:

1. No serious or difficult questions of fact involved;
2. Pendency of large number of similar actions;
3. Presents important constitutional issues, substantial in nature;
4. Early settlement is needed of questioned official procedures both on the part of the Government and local communities;
5. Taxpayers are entitled to end of confusion.

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*This Court, having found such considerations to exist, has granted the writ before judgment in a number of cases in which the identical procedure was followed, e. g., *United States v. Bankers Trust Co.*, 294 U. S. 240; *Railroad Retirement Board v. Alton R. Co.*, 295 U. S. 330; *Rickert Rice Mills v. Fontenot*, 297 U. S. 110; *Carter v. Carter Coal Co.*, 298 U. S. 238; *Ex parte Quirin*, 317 U. S. 1; *United States v. United Mine Workers*, 330 U. S. 258; *Youngstown Co. v. Sawyer*, 343 U. S. 579.

EARLY HEARING

An early determination of the ultimate questions presented by this case is of extreme importance to the plaintiff taxpayer, to the Defense Department of the United States and to the county and city made defendants (petitioners) herein. In addition to the foregoing considerations, there is the pressing practical problem affecting defendants city and county, that substantial amounts of tax revenues are involved in these and the other cases now awaiting trial. Interest is accruing on such taxes paid under protest thereon at the rate of upwards of $10,000.00 a month, prompting the request that this Court fix an early date for hearing on the merits following the receipt of the record and briefs—in the event the foregoing petition is favorably considered.

CONCLUSION

For the reasons stated it is respectfully prayed:

That this petition for writ of certiorari to the United States Court of Appeals for the Sixth Circuit be granted by this Honorable Court to the end that this cause may be reviewed and determined by this Court;

That the matter be set down for early hearing;

That an Order should be issued to preserve the rights of the parties and stay proceedings in the Court of Appeals, Sixth Circuit, pending final decision by this Court.

Respectfully submitted,

CITY OF DETROIT,
a Michigan Municipal Corporation
By PAUL T. DWYER,
its Corporation Counsel, and
BERT R. SOGGE,
VANCE G. INGALLS,
JULIUS C. PLISKOW,
JAMES H. LEE,
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COUNTY OF WAYNE,
a Michigan Constitutional Body Corporate,
By GERALD K. O'BRIEN,
Prosecuting Attorney and
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PHILIP A. McHUGH,
THOMAS J. FOLEY, Jr.,
Assistants Prosecuting Attorney and
ALBERT E. CHAMPNEY,
Of Counsel.

September 15, 1955.

APPENDIX

Procurement Regulations

5-407.2. *Partial Payments.*—(1) *When payments are not to exceed 75 percent of the cost of the property.*—In those cases where it is contemplated that partial payments in an amount not to exceed 75 percent of the cost to the contractor of the property will be made, the contract will contain the following article:

> Partial payments.—Partial payments, which are hereby defined as payments prior to delivery, on work in progress for the Government under this contract, may be made upon the following terms and conditions.
>
> (a) The Contracting Officer may, from time to time, authorize partial payments to the Contractor upon property acquired or produced by it for the performance of this contract: Provided, that such partial payments shall not exceed 75 per cent of the cost to the Contractor of the property upon which payment is made, which cost shall be determined from evidence submitted by the Contractor and which must be such as is satisfactory to the Contracting Officer: Provided further, that in no event shall the total of unliquidated partial payments (see (c) below) and of unliquidated advance payments, if any, made under this contract, exceed 80 percent of the total contract price of supplies still to be delivered.
>
> (b) Upon the making of any partial payment under this contract, title to all parts, materials, inventories, work in process and non durable tools theretofore acquired or produced by the Contractor for the performance of this contract, and properly chargeable thereto

under sound accounting practice, shall forthwith vest in the Government; and title to all like property thereafter acquired or produced by the Contractor for the performance of this contract and properly chargeable thereto as aforesaid shall vest in the Government forthwith upon said acquisition or production: Provided, that nothing herein shall deprive the Contractor of any further partial or final payments due or to become due hereunder; or relieve the Contractor of the Government of any of their respective rights or obligations under this contract.

(c) In making payment for the supplies furnished hereunder, there shall be deducted from the contract price therefor a proportionate amount of the partial payments theretofore made to the Contractor, under the authority herein contained.

(d) It is recognized that property (including, without limitation completed supplies, spare parts, drawings, information, partially completed supplies, work in process, materials, fabricated parts and other things called for herein) title to which is or may hereafter become vested in the Government pursuant to this Article will from time to time be used by or put in care, custody or possession of the Contractor in connection with the performance of this contract. The Contractor, either before or after receipt of notice of termination at the option of the Government, may acquire or dispose of property to which title is vested in the Government under this Article, upon terms approved by the Contracting Officer, provided, that after receipt of notice of termination, any such property that is a part of termination inventory may be acquired or disposed of only in accordance with the provisions of the termination article of this contract and applicable laws

and regulations. The agreed price (in case of acquisition by the contractor) or the proceeds received by the contractor (in case of any other disposition), shall, to the extent that such price and proceeds do not exceed the unliquidated balance of partial payments hereunder, be paid or credited to the Government as the Contracting Officer shall direct; and such unliquidated balance shall be reduced accordingly. Current production scrap may be sold by the Contractor without approval of the Contracting Officer but the proceeds will be applied as provided in this paragraph (d), provided that any such scrap which is a part of termination inventory may be sold only in accordance with the provisions of the termination article of this contract and applicable laws and regulations. Upon liquidation of all partial payments hereunder or upon completion of deliveries called for by this contract, title to all property (or the proceeds thereof) which has not been delivered to and accepted by the Government under this contract or which has not been incorporated in supplies delivered to and accepted by the Government under this contract and to which title has vested in the Government under this Article shall vest in the Contractor.

(e) The article of this contract captioned "Liability for Government-furnished Property" and any other provision of this contract defining liability for Government—furnished property shall be inapplicable to property to which the Government shall have acquired title solely by virtue of the provisions of this Article. The provisions of this Article shall not relieve the Contractor from risk of loss or destruction of or damage to property to which title vests in the Government under the provisions hereof.

(f) If this contract (as heretofore or hereafter supplemented or amended) contains provision for Advance Payments, and in addition if at the time any partial payment is to be made to the Contractor under the provisions of this partial payments article any unliquidated balance of advance payments is outstanding, then notwithstanding any other provision of the Advance Payments Article of this contract the net amount, after appropriate deduction for liquidation of the advance payment, of such partial payment shall be deposited in the special bank account or accounts maintained as required by the provisions of the Advance Payments Article, and shall thereafter be withdrawn only pursuant to such provisions.

(2) *When payments are not to exceed 90 percent of direct labor and material costs.*—In those cases where it is contemplated that partial payments in an amount not to exceed 90 percent of the direct labor and material costs to the contractor will be made, the contract will contain the following article:

Partial payments.—Partial payments, which are hereby defined as payments prior to delivery, on work in progress for the Government under this contract, may be made upon the following terms and conditions.

(a) The Contracting Officer may, from time to time, authorize partial payments to the Contractor upon property acquired or produced by it for the performance of this contract: Provided, that such partial payments shall not exceed 90 percent of the direct labor and direct material costs to the Contractor of the property upon which payment is made, which costs shall be determined from evidence submitted by the Contractor and which must be such as is satisfactory

to the Contracting Officer: Provided further, that in no event shall the total of unliquidated partial payments (see (c) below) and of unliquidated advance payments, if any, made under this contract, exceed 80 percent of the contract price of supplies still to be delivered.

(b) Upon the making of any partial payment under this contract, title to all parts, materials, inventories, work in process and non-durable tools theretofore acquired or produced by the Contractor for the performance of this contract, and properly chargeable thereto under sound accounting practice, shall forthwith vest in the Government; and title to all like property thereafter acquired or produced by the Contractor for the performance of this contract and properly chargeable thereto as aforesaid shall vest in the Government forthwith upon said acquisition or production: Provided, that nothing herein shall deprive the Contractor of any further partial or final payments due or to become due hereunder; or relieve the Contractor or the Government of any of their respective rights or obligations under this contract.

(c) In making payment for the supplies furnished hereunder, there shall be deducted from the contract price therefor a proportionate amount of the partial payments theretofore made to the Contractor, under the authority herein contained.

(d) It is recognized that property (including, without limitation, completed supplies, spare parts, drawings, information, partially completed supplies, work in process, materials, fabricated parts and other things called for herein) title to which is or may hereafter become vested in the Government pursuant to this

Article will from time to time be used by or put in the care, custody or possesion of the Contractor in connection with performance of this contract. The Contractor, either before or after receipt of notice of termination at the option of the Government, may acquire or dispose of property to which title is vested in the Government under this Article, upon terms approved by the Contracting Officer, provided, that, after receipt of notice of termination, any such property that is a part of termination inventory may be acquired or disposed of only in accordance with the provisions of the termination article of this contract and applicable laws and regulations. The agreed price (in case of acquisition by the contractor) or the proceeds received by the Contractor (in case of any other disposition), shall, to the extent that such price and proceeds do not exceed the unliquidated balance of partial payments hereunder, be paid or credited to the Government as the Contracting Officer shall direct; and such unliquidated balance shall be reduced accordingly. Current production scrap may be sold by the Contractor without approval of the Contracting Officer but the proceeds will be applied as provided in this paragraph (d), provided that any such scrap which is a part of termination inventory may be sold only in accordance with the provisions of the termination article of this contract and applicable laws and regulations. Upon liquidation of all partial payments hereunder or upon completion of deliveries called for by this contract, title to all property (or the proceeds thereof) which has not been delivered to and accepted by the Government under this contract or which has not been incorporated in supplies delivered to and accepted by the Government under this contract and to which title has vested in the Government under this Article, shall vest in the Contractor.

(e) The article of this contract captioned "Liability for Government—furnished Property" and any other provision of this contract defining liability for Government-furnished property shall be inapplicable to property to which the Government shall have acquired title solely by virtue of the provisions of this Article. The provisions of this Article shall not relieve the Contractor from risk of loss or destruction of or damage to property to which title vests in the Government under the provisions hereof.

(f) If this contract (as heretofore or hereafter supplemented or amended) contains provision for Advance Payments, and in addition if at the time any partial payment is to be made to the Contractor under the provisions of this partial payments article any unliquidated balance of advance payments is outstanding, then notwithstanding any other provision of the Advance Payments Article of this contract the net amount, after appropriate deduction for liquidation of the advance payment, of such partial payment shall be deposited in the special bank account or accounts maintained as required by the provisions of the Advance Payments Article, and shall thereafter be withdrawn only pursuant to such provisions.

41 U. S. C. A. 151 (Feb. 19, 1948, c. 65, §2, 62 Stat. 21)

§151. PURCHASES AND CONTRACTS FOR SUPPLIES AND SERVICES—(a) APPLICABILITY TO ALL ARMED SERVICES

The provisions of this chapter shall be made applicable to all purchases and contracts for supplies or services made by the Department of the Army, the Department of the Navy, the Department of the Air Force, the United

States Coast Guard, and National Advisory Committee for Aeronautics (each being hereinafter called the agency), for the use of any such agency or otherwise, and to be paid for from appropriated funds.

(b) It is the declared policy of the Congress that a fair proportion of the total purchases and contracts for supplies and services for the Government shall be placed with small business concerns. Whenever it is proposed to make a contract or purchase in excess of $10,000 by negotiation and without advertising, pursuant to the authority of paragraph (7) or (8) of this section, suitable advance publicity, as determined by the agency head with due regard to the type of supplies involved and other relevant considerations, shall be given for a period of at least fifteen days, wherever practicable, as determined by the agency head.

(c) All purchases and contracts for supplies and services shall be made by advertising, as provided in section 152 of this title, except that such purchases and contracts may be negotiated by the agency head without advertising if—

(1) determined to be necessary in the public interest during the period of a national emergency declared by the President or by the Congress;

(2) the public exigency will not admit of the delay incident to advertising;

(3) the aggregate amount involved does not exceed $1,000;

(4) for personal or professional services;

(5) for any service to be rendered by any university, college, or other educational institution;

(6) the supplies or services are to be procured and used outside the limits of the United States and its possessions;

(7) for medicines or medical supplies;

(8) for supplies purchased for authorized resale;

(9) for perishable subsistence supplies;

(10) for supplies or services for which it is impracticable to secure competition;

(11) the agency head determines that the purchase or contract is for experimental, developmental, or research work, or for the manufacture or furnishing of supplies for experimentation, development, research, or test: Provided, That beginning six months after the effective date of this chapter and at the end of each six-month period thereafter, there shall be furnished to the Congress a report setting forth the name of each contractor with whom a contract has been entered into pursuant to this subsection since the date of the last such report, the amount of the contract, and, with due consideration given to the national security, a description of the work required to be performed thereunder;

(12) for supplies or services as to which the agency head determines that the character, ingredients, or components thereof are such that the purchase or contract should not be publicly disclosed;

(13) for equipment which the agency head determines to be technical equipment, and as to which he determines that the procurement thereof without advertising is necessary in order to assure standardization of equipment and interchangeability of parts and that such standardization and interchangeability is necessary in the public interest;

(14) for supplies of a technical or specialized nature requiring a substantial initial investment or an extended period of preparation for manufacture, as determined by the agency head, when he determines that advertising and competitive bidding may require duplication of investment or preparation already made, or will unduly delay procurement of such supplies;

(15) for supplies or services as to which the agency head determines that the bid prices after advertising therefor are not reasonable or have not been independently arrived at in open competition: Provided, That no negotiated purchase or contract may be entered into under this paragraph after the rejection of all bids received unless (A) notification of the intention to negotiate and reasonable opportunity to negotiate shall have been given by the agency head to each responsible bidder, (B) the negotiated price is lower than the lowest rejected bid price of a responsible bidder, as determined by the agency head, and (C) such negotiated price is the lowest negotiated price offered by any responsible supplier;

(16) the agency head determines that it is in the interest of the national defense that any plant, mine, or facility or any producer, manufacturer, or other supplier be made or kept available for furnishing supplies or services in the event of a national emergency, or that the interest either of industrial mobilization in case of such an emergency, or of the national defense in maintaining active engineering, research and development are otherwise subserved: Provided, That beginning six months after the effective date of this chapter and at the end of each six-month period thereafter, there shall be furnished to the Congress a report setting forth the name of each contractor with whom a

contract has been entered into pursuant to this subsection since the date of the last such repor., the amount of the contract, and, with due consideration given to the national security, a description of the work required to be performed thereunder; or

(17) otherwise authorized by law.

(d) If in the opinion of the agency head bids received after advertising evidence any violation of the anti-trust laws he shall refer such bids to the Attorney General for appropriate action.

(e) This section shall not be construed to (A) authorize the erection, repair, or furnishing of any public building or public improvement, but such authorization shall be required in the same manner as heretofore, or (B) permit any contract for the construction or repair of buildings, roads, sidewalks, sewers, mains, or similar items to be negotiated without advertising as required by section 152 of this title, unless such contract is to be performed outside the continental United States or unless negotiation of such contract is authorized by the provisions of paragraphs (1)-(3), (10)-(12), or (15) of subsection (c) of this section.

41 U. S. C. A. 152 (Feb. 19, 1948, c. 65, §3, 62 Stat. 22)

§152. ADVERTISEMENTS FOR BIDS; TIME; OPENING OF BIDS; AWARD OR REJECTION OF BIDS

Whenever advertising is required—

(a) The advertisement for bids shall be a sufficient time previous to the purchase or contract, and specifications and invitations for bids shall permit such full and free competition as is consistent with the procurement of types

of suppplies and services necessary to meet the requirements of the agency concerned.

(b) All bids shall be publicly opened at the time and place stated in the advertisement. Award shall be made with reasonable promptness by written notice to that responsible bidder whose bid, conforming to the invitation for bids, will be most advantageous to the Government, price and other factors considered: Provided, That all bids may be rejected when the agency head determines that it is in the public interest so to do.

41 U. S. C. A. 153 (Feb. 19, 1948, c. 65, §4, 62 Stat. 23; Oct. 31, 1951, c. 652, 65 Stat. 700)

§153. TYPES OF CONTRACTS—(a) DISCRETION OF AGENCY HEAD: WARRANTY CLAUSE

Except as provided in subsection (b) of this section, contracts negotiated pursuant to section 151 (c) of this title may be of any type which in the opinion of the agency head will promote the best interests of the Government. Every contract negotiated pursuant to section 151 (c) of this title shall contain a suitable warranty, as determined by the agency head, by the contractor that no person or selling agency has been employed or retained to solicit or secure such contract upon an agreement or understanding for a commission, percentage, brokerage or contingent fee, excepting bona fide employees or bona fide established commercial or selling agencies maintained by the contractor for the purpose of securing business, for the breach or violation of which warranty the Government shall have the right to annul such contract without liability or in its discretion to deduct from the contract price or consideration the full amount of such commission, percentage, brokerage, or contingent fee.

(b) The cost-plus-a-percentage-of-cost system of contracting shall not be used, and in the case of a cost-plus-a-fixed-fee contract the fee shall not exceed 10 per centum of the estimated cost of the contract, exclusive of the fee, as determined by the agency head at the time of entering into such contract (except that a fee not in excess of 15 per centum of such estimated cost is authorized in any such contract for experimental developmental, or research work and that a fee inclusive of the contractor's costs and not in excess of 6 per centum of the estimated cost, exclusive of fees, as determined by the agency head at the time of entering into the contract, of the project to which such fee is applicable is authorized in contracts for architectural or engineering services relating to any public works or utility project). Neither a cost nor a cost-plus-a-fixed fee contract nor an incentive-type contract shall be used unless the agency head determines that such method of contracting is likely to be less costly than other methods or that it is impractical to secure supplies or services of the kind or quality required without the use of a cost or cost-plus-a-fixed-fee contract or an incentive-type contract. All cost and cost-plus-a-fixed-fee contracts shall provide for advance notification by the contractor to the procuring agency of any subcontract thereunder on a cost-plus-a-fixed-fee basis and of any fixed price subcontract or purchase order which exceeds in dollar amount either $25,000 or 5 per centum of the total estimated cost of the prime contract; and a procuring agency, through any authorized representative thereof, shall have the right to inspect the plans and to audit the books and records of any prime contractor or subcontractor engaged in the performance of a cost or cost-plus-a-fixed-fee contract.

(c) All contracts negotiated without advertising pursuant to authority contained in this chapter shall include a clause to the effect that the Comptroller General of the

United States or any of his duly authorized representatives shall until the expiration of three years after final payment have access to and the right to examine any directly pertinent books, documents, papers, and records of the contractor or any of his subcontractors engaged in the performance of and involving transactions related to such contracts or subcontracts.

41 U. S. C. A. 154 (Feb. 19, 1948, c. 65, §5, 62 Stat. 24)

§154. ADVANCE PAYMENTS UNDER NEGOTIATED CONTRACTS; TERMS

(a) The agency head may make advance payments under negotiated contracts heretofore or hereafter executed in any amount not exceeding the contract price upon such terms as the parties shall agree: Provided, That advance payments shall be made only upon adequate security and if the agency head determines that provision for such advance payments is in the public interest or in the interest of the national defense and is necessary and appropriate in order to procure required supplies or services under the contract.

(b) The terms governing advance payments may include as security provision for, and upon inclusion of such provision there shall thereby be created, a lien in favor of the Government, paramount to all other liens, upon the supplies contracted for, upon the credit balance in any special account in which such payments may be deposited and upon such of the material and other property acquired for performance of the contract as the parties shall agree.

41 U. S. C. A. 255 (June 30, 1949, c. 288, Title III, §305, 63 Stat. 396)

§255. ADVANCE PAYMENTS ON NEGOTIATED CONTRACTS; GOVERNING TERMS

(a) The agency head may make advance payments under negotiated contracts heretofore or hereafter executed in any amount not exceeding the contract price upon such terms as the parties shall agree: Provided, That advance payments shall be made only upon adequate security and if the agency head determines that provision for such advance payments is in the public interest or in the interest of the national defense and is necessary and appropriate in order to procure required supplies or services under the contract.

(b) The terms governing advance payments may include as security provision for, and upon inclusion of such provision there shall thereby be created, a lien in favor of the Government, paramount to all other liens, upon the supplies contracted for, upon the credit balance in any special account in which such payments may be deposited and upon such of the material and other property acquired for performance of the contract as the parties shall agree.

31 U. S. C. A. 529; R. S. §3648; Aug. 2, 1946, c. 744, 60 Stat. 809

§529. ADVANCES OF PUBLIC MONEYS; PROHIBITION AGAINST

No advance of public money shall be made in any case unless authorized by the appropriation concerned or other law. And in all cases of contracts for the performance of any service, or the delivery of articles of any descrip-

tion, for the use of the United States, payment shall not exceed the value of the service rendered, or of the articles delivered previously to such payment. It shall, however, be lawful, under the special direction of the President, to make such advances to the disbursing officers of the Government as may be necessary to the faithful and prompt discharge of their respective duties, and to the fulfillment of the public engagements. The President may also direct such advances as he may deem necessary and proper, to persons in the military and naval service employed on distant stations, where the discharge of the pay and emoluments to which they may be entitled cannot be regularly effected.

34 U. S. C. A. 582 (Aug. 22, 1911, c. 42, 37 Stat. 32)

§582. PARTIAL PAYMENTS DURING WORK.

The Secretary of the Navy is authorized, in his discretion, to make partial payments from time to time during the progress of the work under all contracts made under the Navy Department for public purposes, but not in excess of the value of work already done; and the contracts made shall provide for a lien in favor of the Government, which lien is made paramount to all other liens, upon the articles or thing contracted for on account of all payments so made: Provided, That partial payments shall not be made under such contracts except where stipulated for, and then only in accordance with contract provisions.

50 U. S. C. A. 611 (Dec. 18, 1941, c. 593, Title II, §201, 55 Stat. 839; Jan. 12, 1951, c. 1230, §1, 64 Stat. 1257)

§611. WAR CONTRACTS EXEMPT FROM CERTAIN RESTRICTIONS UPON AUTHORIZATION BY PRESIDENT

The President may authorize any department or agency of the Government exercising functions in connection with the national defense, in accordance with regulations prescribed by the President for the protection of the interests of the Government, to enter into contracts and into amendments or modifications of contracts heretofore or hereafter made and to make advance, progress and other payments thereon, without regard to the provisions of law relating to the making, performance, amendment, or modification of contracts whenever he deems such action would facilitate the prosecution of the war: Provided, That nothing herein shall be construed to authorize the use of the cost-plus-a-percentage-of-cost system of contracting; Provided further, That nothing herein shall be construed to authorize any contracts in violation of existing law relating to limitation of profits: Provided further, That all acts under the authority of this section shall be made a matter of public record under regulations prescribed by the President and when deemed by him not to be incompatible with the public interest: Provided further, That all contracts entered into, amended, or modified pursuant to authority contained in this section shall include a clause to the effect that the Comptroller General of the United States or any of his duly authorized representatives shall have access to and the right to examine any pertinent books, documents, papers, and records of the contractor or any of his subcontractors engaged in the performance of and involving transactions related to such contracts or subcontracts.

211.1 Compiled Laws Michigan 1948; M. S. A. 7.1

Sec. 1. That all property, real and personal, within the jurisdiction of this state, not expressly exempted, shall be subject to taxation.

440.26 Compiled Laws Michigan 1948; M. S. A. 19.266

Sec. 26. Creditors' rights against sold goods in seller's possession. Where a person having sold goods continues in the possession of the goods, or of negotiable documents of title to the goods and such retention of possession is fraudulent in fact or is deemed fraudulent under any rule of law, a creditor or creditors of the seller may treat the sale as void.

566.137 Compiled Laws Michigan 1948; M. S. A. 26.926

Sec. 7. Every sale made by a vendor, of goods and chattels in his possession, or under his control, unless the same be accompanied by an immediate delivery, and be followed by an actual and continued change of possession of the things sold, shall be presumed to be fraudulent and void, as against the creditors of the vendor, or subsequent purchasers in good faith, and shall be conclusive evidence of fraud, unless it shall be made to appear, on the part of the persons claiming under such sale or assignment, that the same was made in good faith, and without any intent to defraud such creditors or purchasers: Provided, however, That such presumption shall not arise in case a bill of sale of the goods and chattels conveyed, or a true copy thereof, shall be filed in the office of the register of deeds of the county in which the goods or chattels are located and also where the vendor resides except, in case such vendor is a non-resident of the state, in which case, such bill of sale or

true copy thereof shall be filed in the office of the register of deeds of the county in which the goods or chattels are located; and unless either the vendor or purchaser named in such bill of sale, or some person having knowledge of the facts, shall before the filing of the same, make and annex thereto, an affidavit setting forth that the same was given in good faith and not for the purpose of security or for defrauding creditors of the vendor or subsequent purchasers: Provided, however, That in case of motor vehicles and other property, the registration of title to which is otherwise expressly provided for by statute, such presumption shall not arise if such statutory requirements are complied with. No officer shall receive such instrument or file same in his office until such affidavit is made and annexed thereto: Provided, however, That where the original instrument bears such affidavit annexed thereto it shall be sufficient that a copy of such instrument offered for filing also bears a copy of such affidavit. Every person who shall knowingly make any false statement in any such affidavit upon conviction thereof shall be deemed guilty of the crime of perjury: Provided, That in case the vendor is a corporation engaged in transporting passengers or freight over fixed routes or conveying electricity or gas or telephonic or telegraphic communication it shall be sufficient compliance with the requirements of this act to file such bill of sale or copy thereof with the register of deeds of each county through which the lines or property of the vendor passes.

Copies of such bill of sale may with like effect be filed in the office of the register of deeds of the county to which such goods or chattels or any portion thereof may be removed. This provision shall not be construed as altering or affecting the foregoing requirements as to the office or offices in which such bill of sale or copy thereof shall be filed.

OPINION

of Hon. Thomas P. Thornton, United States District Judge

(June 23, 1955)

The Murray Corporation, plaintiff herein, brings this action to recover *ad valorem* personal property taxes assessed by the City of Detroit, County of Wayne, upon personal property in the possession of the Murray Corporation, said taxes having been paid by the plaintiff under protest. The amount assessed by the City was $67,714.96, and that by the County was $12,572.66. The United States of America was permitted to intervene because of the fact that it claimed ownership of the personal property on which the assessments were made. The personal property so taxed was in the possession of the plaintiff under letter subcontracts, under prime letter contracts, for the manufacture of parts and components for aircraft for the United States Air Force for defense purposes.

The plaintiff has moved for summary judgment in its favor, and at the hearing of this motion it was agreed among the parties that there was no genuine issue of any material fact, and that a summary judgment in favor of the plaintiff, or in favor of the defendants would be in order.

The Court is not unmindful of the effects of its decision in this matter. The Court has been advised that there are many actions in this geographical area that have been commenced, or are about to be commenced, involving the issue which we are here called upon to resolve, and that the aggregate of taxes involved may well be in the neighborhood of two million dollars.

The parties to this suit have presented oral arguments followed by the submission of successive briefs totaling

seven in number. As previously stated, the factual picture here presented is undisputed—not so, however, as to its legal significance. The plaintiff is a letter subcontractor of the Kaiser Manufacturing Corporation to which a letter prime contract between the United States Government and the Kaiser-Fraser Corporation was assigned by mutual consent. The letter subcontract between the Kaiser Manufacturing Corporation and the plaintiff covered the manufacture of specified parts and assemblies required under the prime contract for the United States Air Force for national defense. This letter subcontract and its amendments were approved by a Contracting Officer of the United States Air Force in accordance with the requirements of the letter prime contract. Included in the letter subcontract, by amendment, was the Partial Payment Clause which is the nub of this controversy. The following is the text of said cause:

> "11. Partial payments—Partial payments, which are hereby defined as payments prior to delivery, on work in progress for the Government under this contract, may be made upon the following terms and conditions.
>
> "(a) The Contracting Officer may, from time to time authorize partial payments to The Murray Corporation of America (hereinafter called 'the Contractor') upon property acquired or produced by it for the performance of this contract: *Provided,* that such partial payments shall not exceed 90 percent of the cost to the Contractor of the property upon which payment is made, which cost shall be determined from evidence submitted by the Contractor and which must be such as is satisfactory to the Contracting Officer; *Provided further,* that in no event shall the total of unliquidated partial payments (see (c) below) and of unliquidated partial payments, if any, made under this contract,

exceed 80 percent of the contract price of supplies still to be delivered.

"(b) Upon the making of any partial payment under this contract, title to all parts, materials, inventories, work in process and non-durable tools theretofore acquired or produced by the Contractor for the performance of this contract, and properly chargeable hereto under sound accounting practice, shall forthwith vest in the Government; and title to all like property thereafter acquired or produced by the Contractor for the performance of this contract and properly chargeable thereto as aforesaid shall vest in the Government forthwith upon said acquisition or production; *Provided,* that nothing herein shall deprive the Contractor of any further partial or final payments due or to become due hereunder; or relieve the Contractor, Kaiser-Frazer Corporation, or the Government of any of their respective rights or obligations under this contract.

"(c) In making payment for the supplies furnished hereunder, there shall be deducted from the contract price therefor a proportionate amount of the partial payments theretofore made to the Contractor, under the authority herein contained.

"(d) It is recognized that property (including, without limitation, completed supplies, spare parts, drawings, information, partially completed supplies, work in process, materials, fabricated parts and other things called for herein) title to which is or may hereafter become vested in the Government pursuant to this Article will from time to time be used by or put in the care, custody or possession of the Contractor in connection with the performance of this contract. The Contractor, either before or after receipt of notice of termination at the option of the Government, may acquire or dispose of property to which title is vested in the Government under this Article, upon terms approved by the Contracting Officer, provided, that,

after receipt of notice of termination, any such property that is a part of termination inventory may be acquired or disposed of only in accordance with the provisions of the termination article of this contract and applicable laws and regulations. The agreed price (in case of acquisition by the contractor) or the proceeds received by the Contractor (in case of any other disposition), shall, to the extent that such price and proceeds do not exceed the unliquidated balance of partial payments hereunder, be paid or credited to the Government as the Contracting Officer shall direct; and such unliquidated balance shall be reduced accordingly. Current production scrap may be sold by the Contractor without approval of the Contracting Officer but the proceeds will be applied as provided in this paragraph (d), provided that any such scrap which is a part of termination inventory may be sold only in accordance with the provisions of the termination article of this contract and applicable laws and regulations. Upon liquidation of all partial payments hereunder or upon completion of deliveries called for by this contract, title to all property (or the proceeds thereof) which has not been delivered to and accepted by the Government under this contract or which has not been incorporated in supplies delivered to and accepted by the Government under this contract and to which title has vested in the Government under this Article shall vest in the Contractor.

"(e) The article of this contract captioned 'Liability for Government-furnished Property' and any other provision of this contract defining liability for Government-furnished property shall be inapplicable to property to which the Government shall have acquired title solely by virtue of the provisions of this Article. The provisions of this Article shall not relieve the Contractor from risk of loss or destruction of or damage to property to which title vests in the Government under the provisions hereof.

> "(f) If this contract (as heretofore or hereafter supplemented or amended) contains provision for Advance Payments, and in addition if at the time any partial payment is to be made to the Contractor under the provisions of this partial payments article any unliquidated balance of advance payments is outstanding, then notwithstanding any other provision of the Advance Payments Article of this contract the net amount, after appropriate deduction for liquidation of the advance payment, of such partial payment shall be deposited in the special bank account or accounts maintained as required by the provisions of the Advance Payments Article, and shall thereafter be withdrawn only pursuant to such provisions."

The plaintiff herein was a letter subcontractor also of the Wright Aeronautical Corporation, later merged with Curtiss-Wright Corporation, and the same situation prevailed in its relationship to Curtiss-Wright as did with respect to its relationship to the Kaiser Manufacturing Corporation insofar as pertains to the issues with which we are here concerned—the terms of the Partial Payment Clause and approval of their inclusion in the letter subcontracts by the Contracting Officer of the United States Air Force.

The assessment date here in question was January 1, 1952. During the calendar year 1951 the plaintiff made formal written requests at various intervals, and in varying amounts for payments to it by its two contractors—Kaiser Manufacturing Corporation and Curtiss-Wright Corporation—in accordance with the Partial Payment Clauses contained in the respective letter subcontracts. Said requests were audited and approved by a Contracting Officer of the United States Air Force. On October 12, 1951, partial payment in the amount of $163,949.20,

representing the aggregate amount of the requests, was made by the Kaiser Manufacturing Corporation to plaintiff, and on December 31, 1951, a payment of $510,827.67 was similarly made by Curtiss-Wright to plaintiff.

The position of the plaintiff is that it has paid taxes which were unlawfully assessed to it, and that the assessment is illegal and void. Plaintiff contends:

I. The tax assessed is an *ad valorem* tax assessed upon the property and not a privelege tax assessed against the taxpayer.

II. Property owned by the Federal Government is immune from local *ad valorem* property tax.

III. The question of title under procurement contracts entered into pursuant to Federal Procurement statutes and constitutional authority presents a Federal question for determination by Federal courts under Federal law exclusively, and is in nowise subject to, or controlled by the law of any state.

IV. Partial payment clauses vesting title in the Federal Government were fully authorized and effective.

V. Under the partial payment clauses title to the property here in question was vested in the United States Government on assessment day, January 1, 1952. This was absolute title—not bare lien or security title.

VI. Equitable arguments advanced by defendants, City of Detroit and County of Wayne, have been fully and completely rejected by the Supreme Court of the United States.

VII. Murray is the real party in interest and the proper party to bring this action.

VIII. There is nothing in the conduct of the parties inconsistent with the vesting of absolute title, or which could divest the United States Government of such title.

IX. The taxes were not paid voluntarily, but under protest.

The United States contends that the assessment was based on property of the United States and was constitutionally invalid. It reasons that the ownership of the property was vested in the United States when the assessment was made, said ownership having vested at the time of the making of partial payments in accordance with the Partial Payment Clause, which was fully authorized. It also devotes some of its argument to the proposition that the Murray Corporation is the real party in interest.

In direct opposition to the contentions of the plaintiff and to those of the United States, the position of the City of Detroit is that:

I. The partial payment and transfer of title clause was not authorized, nor was it in conformance with the Federal statutes.

II. The inclusion of the above clause would not defeat an *ad valorem* tax on personal property in the hands of an independent subcontractor acquired in the course of carrying out provisions of a subcontract for defense production.

III. The course of action and dealing with the property was inconsistent with the vesting of absolute title; the Government, therefore, was given only a lien or title for security purposes, leaving plaintiff with an equitable title in said personal property which was still subject to an *ad valorem* property tax.

The position of the County of Wayne is aligned with that of the City of Detroit. It contends that the Murray Corporation is not the real party in interest. It also contends that the Contracting Officer had no authority to authorize the prime contractor to include the Partial Payment Clause or to include the provision for the passage of title from the subcontractor to the Government in the contracts between the prime and the subcontractors. Both the City and the County stand firm in their conviction as to the validity of the tax in question.

It is the County of Wayne which urges so strongly the proposition that plaintiff here is in non-compliance with Rule 17 (a) F. R. C. P. The City fails to raise this point, which may or may not be significant. In any event the theory of the County is that the plaintiff has recovered the major portion of the taxes paid by passing it on to the prime contractor, and that plaintiff therefore has sustained no loss and, as a result, has no right to bring this action. The theory of the plaintiff is that the person having the right sought to be enforced, by substantive law, is the real party in interest, and that it is the law of the State which determines what is the substantive law. Under Michigan law (M. S. A. 7.97) it is the person paying a tax such as this who may sue for refund. There is no claim made by the County that the plaintiff assigned its claim for the tax refund. It merely claims that because the amount of such tax was included as an item of plaintiff's cost in billing the prime contractor that plaintiff has deprived itself of the right to sue for refund. The cases to this effect cited by the County are inapposite. The Court is constrained to conclude that the argument of the County on this issue is specious.

The next point for discussion has to do with the validity of the inclusion of the Partial Payment Clause in the let-

ter subcontracts. Both County and City contend that the authority for such procedure was lacking. Before making any comment upon the merit of this point, it occurs to the Court that there is some doubt concerning the propriety of a collateral attack by a city and a county upon the validity of a provision in a contract existing between parties to such contract when neither city nor county is itself party to said contract, and when the overall picture is as it is here. Such an issue may well be one that this Court should decline to resolve. None of the parties to the prime contract, or to the subcontract, contests the authority of the United States to include the Partial Payment Clause. It may well be that such authority might be properly questioned in a direct proceeding by the proper parties. Be that as it may, we are persuaded that the Partial Payment Clause herein is not invalid for want of authority, or for non-conformance with Federal statutes.

The point at issue most strongly debated, and having the greatest merit, is the effect of the Partial Payment Clause. There is no disagreement on the proposition that local government may not tax property owned by the Federal Government. Whether the personal property here assessed was owned by the Federal Government in the sense that it could not be taxed at a local level is the issue. A reading of the Partial Payment Clause leaves no doubt that, upon the making of a partial payment, title to parts, materials, etc., acquired for the performance of the contract vests in the United States Government as does title to all property subsequently acquired for the performance of the contract.

It is the position of the City of Detroit that the transfer of title upon the making of partial payment is effective to create a lien, that the title of the United States to

the property in question is security title only, and that plaintiff still remains the beneficial owner. The City cites numerous cases which it claims support this contention. In many, analogy is drawn to an equitable mortgage situation where, although title be transferred, said title is merely for security purposes, and is treated by the Courts as such. The City cites *S. R. A. Inc. v. Minnesota,* 327 U. S. 558 (1945) as authority for the proposition that despite the transfer of legal title here, the plaintiff still retained beneficial interest subject to taxation by the state. It is not perceived that the holding in this case supports the City's position. If the reasoning there used and quoted in the brief of the City be applied here, the argument of the City must fail. In that case the United States had contracted to sell land. The State sought to tax the realty at a time when the United States still held legal title. The Court held that it might do so—that the contract for the purchase of the land transferred the equity to the vendee and that the vendor, United States, retained only a legal title as security. The Court also went on to state that the "possibility of repossession by the United States is not enough to block a tax sale in which the paramount rights of the United States are protected." *S. R. A. Inc. v. Minnesota, supra,* 566. In the instant case the United States is the vendee of the assessed property. It has contracted with the prime contractor for the manufacture of aircraft sub-assemblies for delivery to it, for use by it, to be paid for by it, and to be fully and completely owned by it in every sense of the word ownership. It is submitted that title held for security purposes is a title that is intended to be relinquished, and whose forward look is transfer to a vendee, or retransfer to a mortgagor. Such title is temporary in nature, and it is so regarded by the parties. The City

offers numerous arguments—all very creditable and well presented—to the effect that, although bare legal title passed to the United States, the equitable title remained in the plaintiff. The brief of the City devotes some time to a so-called "course of conduct and dealing with the property in question inconsistent with the claim of absolute title in the Government." In its printed brief, at page 50, the City lists ten "salient facts" as illustrative of the inconsistent course of conduct. In view of the type of sub-contract here involved, the scope of the operation, the practical exigencies existent, these ten "salient facts" are not persuasive when balanced against what is viewed to be an overriding consideration.

A type of contract whose ultimate purpose is specification manufacturing for a purchaser under which title is to pass before delivery, but after partial payment, appears to this Court to be a far cry from any customary lien or security situation. There is no contention here that the United States is at any time to re-transfer title to the manufactured product(s) back to the plaintiff once the plaintiff has performed the necessary conditions. There is no mere lien here which the United States might foreclose. Might it be legally said that if the plaintiff failed to complete the manufacturing that the United States could not take possession of the property in question and assign it to another manufacturer for completion?

It was intended by the parties that plaintiff was to manufacture certain sub-assemblies according to specification which would become the property of the purchaser, United States. The fact of future delivery is not determinative of ownership. The fact of contractual agreement is—such agreement stipulating the time for passage of title. Why should plain, unambiguous language be distorted so as to convert a legal title holder to a lienor be-

cause persons not party to the contract contend that title passed prematurely? If a lien situation is to be construed, it could only be in favor of the plaintiff as to labor and materials not paid for (without considering for the moment the legality of a lien on Government property).

In summing up, it appears that the position of the defendants here, in order to be maintained, requires a forced construction of the contracts involved, whereas a natural construction does violence to no legal or equitable concepts. It is therefore concluded that summary judgment should be entered for the plaintiffs, and an order may be presented accordingly.

Dated at Detroit, Michigan, this 23rd day of June, A. D. 1955.

THOMAS P. THORNTON (signed),
United States District Judge.

In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 413

CITY OF DETROIT, a Michigan Municipal Corporation, and COUNTY OF WAYNE, a Michigan Constitutional Body Corporate, PETITIONERS

v.

THE MURRAY CORPORATION OF AMERICA, a Delaware Corporation, and THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

This suit was brought by the Murray Corporation of America for the recovery of *ad valorem* personal property taxes assessed against it by the City of Detroit and County of Wayne, Michigan, as of January 1, 1953, in the amounts of $67,714.96 and $12,572.66, respectively. The United States petitioned for leave, and was allowed, to intervene

for the reason that, claiming the ownership of the property on which the assessment was based, it had an interest in the litigation which it was entitled to protect.

The basic questions in the case are: (1) Did the United States own the personal property in question when the assessment was made, where the Murray Corporation contract provided that upon the making of partial payments to the corporation —and such payments were made prior to tax day— title to all material and work in progress should vest in the United States, and (2) was the Murray Corporation the real party in interest and the proper party plaintiff for purposes of a suit to recover the disputed taxes?

The District Court for the Eastern District of Michigan answered both of the questions in the affirmative and held that, because the property was that of the United States and immune from taxation by any state, the plaintiff was entitled to recover.

Within the appropriate time limits the City of Detroit and County of Wayne filed notices and docketed their appeals with the Court of Appeals for the Sixth Circuit. The case is now pending in that court, having been neither briefed nor argued.

Petitioners seek to have this Court issue a writ of certiorari to review the pending case before judgment is given in the Court of Appeals. To support their request for the extraordinary use of the writ, "a power not ordinarily to be exercised" (see *The Three Friends,* 166 U. S. 1, 49), peti-

tioners urge the following: (1) No serious question of fact is involved; (2) a large number of similar cases are pending; (3) important constitutional issues are presented; (4) early settlement of procedures to be followed by federal and local governments is needed; and (5) taxpayers are entitled to have existing confusion resolved.

We think that petitioners have failed to show that this case is one "of such imperative public importance as to justify the deviation from normal appellate processes and to require immediate settlement in this court". Rule 20, Revised Rules of this Court. The reasons which petitioners advance are not unusual. They are frequently, if not usually, to be found in litigation where state or local taxing authorities are endeavoring to tax property or transactions which it is contended are beyond the reach of their powers. There is nothing about this case which suggests that the normal delay in following the usual appellate course would result in irrevocable changes of the *status quo* or work to the irreparable or serious detriment of any party. Compare *Ex parte Quirin*, 317 U. S. 1; *United States* v. *Mine Workers*, 330 U. S. 258; *Youngstown Co.* v. *Sawyer*, 343 U. S. 579.

On the other hand, this Court has in many cases emphasized the extent to which it is aided by having prior consideration and review by the Courts of Appeals. It has denied certiorari for want of such review on more than one occasion. *E.g., United States* v. *Montgomery Ward & Co.*, 324 U. S. 858; *United Steelworkers* v. *United*

States, 344 U. S. 915. In the circumstances, the Government believes that the petition for certiorari fails to set forth sufficient grounds for immediate review of the District Court's decision by this Court, prior to consideration by the Court of Appeals.

Respectfully submitted,

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OCTOBER, 1955.

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HAROLD B. WILLEY, C

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 413

CITY OF DETROIT,
a Michigan Municipal Corporation, and
COUNTY OF WAYNE,
a Michigan Constitutional Body Corporate,
Petitioners and Defendants,
vs.
THE MURRAY CORPORATION OF AMERICA,
a Delaware Corporation,
Respondent and Plaintiff
and
THE UNITED STATES OF AMERICA, Intervenor

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONSE TO MEMORANDUM FOR THE UNITED STATES

CITY OF DETROIT, a Michigan
Municipal Corporation,
By PAUL T. DWYER,
Its Corporation Counsel, and
JAMES H. LEE,
Assistant Corporation Counsel,
and
COUNTY OF WAYNE, a Michigan
Constitutional Body Corporate,
By GERALD K. O'BRIEN,
Prosecuting Attorney, and
ALBERT E. CHAMPNEY,
Of Counsel,
Petitioners and Defendants.

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RESPONSE TO MEMORANDUM FOR THE UNITED STATES

This response is made to Memorandum of the United States to touch on just two of the elements presented in our Petition. One is completely unanswered (large number of similar cases pending). The other, in connection with our reason for request for early hearing (p. 15), has been dismissed as causing no changes of the status quo.

It is inevitable that this Court will in the very near future have before it a number of like cases appealed from the several Circuits. Our authority comes from the very Brief and Appendix for the United States filed with the trial judge in the District Court, at p. 34:

> "Also, as the Court knows from statements made at the oral argument, recently the Government has been presented with the same basic problem in other jurisdictions. The number of contracts, as well as the amounts involved, is substantially greater than here. No doubt, some of the same arguments will be advanced. Until an authoritative decision has been rendered by a federal court on which is, essentially, a federal question, the problem remains a fairly critical one to the Government and its procuring agencies."

This candid expression regarding the overall litigation was forcefully urged as a consideration for the Court in deciding the first case of the many now pending in this district which involve taxes of upwards of $2,000,000. We submit it applies equally here—particularly as self-answer to the Government's present contention.

As a corollary to the foregoing argument we submit any duplication of effort by this Court and the several Circuits is best avoided and serves as another good reason for this first test to be immediately settled by this Court.

It appears to be the policy of this Court to grant certiorari to avoid the chance of conflicting decisions from the several Circuits where issues of federal law and other showing of public importance is presented. Petitioners submit that such need for uniformity of opinion exists here. (*Carter v. Carter Coal Company,* 298 U. S. 238, 80 L. Ed. 1160; *Norman v. Baltimore and Ohio Railroad Company,* 294 U. S. 240, 79 L. Ed. 885.)

The Government is obviously concerned with the problem which it labelled fairly critical. We do not believe that there is room for distinction between *imperative* and the term *fairly critical* as used in the District Court Brief.

An authoritative decision and, as we see it, an immediate one, is urgently needed at once by three levels of government and their many agencies; otherwise, the conflicting and continuing processes of representatives of the public at each level sincerely performing duties as advised by their counsel will pyramid into a scrap heap of fruitless and wasted time, energy and tax money.

The City and County are not inclined to maintain the passive attitude indicated by the Government's Memorandum in opposition to their Petition. They are concerned with inter-related budgeting, taxing and operating procedures which await the outcome of this litigation. They must gropingly continue to provide local services with revenues from the taxes affected for each year until disposition of the issues presented. Contrary to the claim of no change in status quo or serious detriment herein, in the event of ultimate affirmance of the District Court decision, the delay of another year would result in unnecessary loss by these defendants of what to local governments are large sums in interest.*

While silent for the time being, plaintiff, The Murray Corporation, originally recognized the gravity of the issues involved and opened its main Brief in the District Court with this clarion statement:

"This case is of national importance."

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*$120,000 a year in the case of defendants and an overall loss of possibly $1,000,000 a year based on the Government's statement, above noted, that amounts involved elsewhere are greater than here.

Later, at p. 3, it stated:

> "Because this question is of far-reaching importance to the Federal Government, it has intervened in this action."

CONCLUSION

We therefore, respectfully submit that all counsel are of the same mind up to the point of the degree of public importance of this test case. On that score we trust that pressing urgency has been noted by the Court sufficient to entitle this matter to be considered immediately by granting jurisdiction.

Respectfully submitted,

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Municipal Corporation,
By PAUL T. DWYER,
Its Corporation Counsel, and
JAMES H. LEE,
Assistant Corporation Counsel,
and
COUNTY OF WAYNE, a Michigan
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ALBERT E. CHAMPNEY,
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Petitioners and Defendants.

October 24, 1955.